

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

VIRGINIA COALITION FOR) Case Nos. 1:24-cv-1778
IMMIGRANT RIGHTS, *et al.*,) 1:24-cv-1807
Plaintiffs,)
v.) Alexandria, Virginia
SUSAN BEALS,) October 18, 2024
in her official capacity as) 11:00 a.m.
Virginia Commissioner of)
Elections, et al.,)
Defendants.)
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TRANSCRIPT OF PLAINTIFF'S EMERGENCY MOTION FOR
EXPEDITED DISCOVERY
BEFORE THE HONORABLE WILLIAM B. PORTER
UNITED STATES MAGISTRATE JUDGE

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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1 P R O C E E D I N G S

2 THE COURTROOM DEPUTY: Calling Civil Action
3 Matter 24-cv-1778, *Virginia Coalition for Immigrant*
4 *Rights, et al. v. Susan Beals, et al.*

5 Would counsel please state your name for the
6 record.

7 MS. LEEPER: Simone Leeper appearing for
8 plaintiffs. Also with me from the Campaign Legal
9 Center is Brent Ferguson, Shanna Ports, and our law
10 fellow Lucas Della Ventura.

11 THE COURT: Good morning.

12 MS. LEEPER: Good morning.

13 MR. SANFORD: Good morning, Your Honor.
14 Deputy Attorney General Tyler Sanford. Here with me
15 today is Assistant Attorney General Stanley Hammer.
16 We're here for the defendants.

17 THE COURT: Good morning.

18 Before we get started, Ms. Leeper, I just
19 noticed in looking through the docket sheet -- or I
20 should say we just noticed in looking through the
21 docket sheet that your *pro hac* has not yet been
22 admitted. Is that right?

23 MS. LEEPER: Yes, Your Honor.

24 THE COURT: Okay. I've reviewed the
25 material, and I've entered that order admitting you *pro*

1 hac.

2 MS. LEEPER: Thank you, Your Honor.

3 THE COURT: All right. We're here today on
4 plaintiffs' emergency motion for expedited discovery in
5 Case No. 1778.

6 I thank counsel for your expedited briefings.
7 They were very helpful to the Court in preparing for
8 today's hearing and evaluating the issues. I've read
9 them. I've considered them. I'm happy to hear from
10 you today as to anything you may want to supplement or
11 emphasize.

12 I'll start with you, Ms. Leeper.

13 MS. LEEPER: Thank you, Your Honor.

14 As I noted, I'm here to represent the
15 plaintiffs, Virginia Coalition for Immigrant Rights,
16 Legal Women Voters of Virginia, and African Communities
17 Together.

18 Plaintiffs firmly believe that they have
19 satisfied the burden to be granted a motion for
20 preliminary injunction. However, we are here seeking
21 emergency limited discovery to assist the court in the
22 consideration of that motion.

23 THE COURT: Let's start with that specific
24 point. What is it exactly do you think you need for
25 this hearing on Thursday?

1 MS. LEEPER: Yes, Your Honor. Specifically,
2 the number of voters that have been removed from the
3 rolls by the purged program and the identities of those
4 voters and the extent and understanding of how the
5 purged program is currently operating to understand the
6 recent harm caused by the program throughout the
7 Commonwealth.

8 THE COURT: All right. I noticed in your
9 papers you seem to be seeking also the 6,000 -- I think
10 it's 303 folks who had been identified in Executive
11 Order 35. Are you walking away from that for purposes
12 of this motion?

13 MS. LEEPER: Your Honor, for purposes of this
14 motion, plaintiffs are willing to limit even further
15 the discovery that they're seeking. So that would be
16 the purged list within the 90-day window, the voter
17 file from the day of the executive order and present
18 day to be able to understand that list, and who has
19 been removed. And, Your Honor, a single deposition of
20 a 30(b)(6) witness from the Department of Elections,
21 the commissioner's office, who is capable of testifying
22 about the way in which the purged program is currently
23 being carried out.

24 THE COURT: Okay. And at this point, then,
25 you're not seeking any information relating to the

1 instructions given to the various registrars in
2 implementing the purged program?

3 MS. LEEPER: Your Honor, if you would be
4 inclined to grant that relief, we'd certainly welcome
5 it. However, we're willing to limit if that is what
6 you are inclined to do as well.

7 THE COURT: All right. Thank you. You can
8 continue.

9 MS. LEEPER: Thank you.

10 As I noted, we feel that this information is
11 going to be helpful to guide necessary relief if the
12 motion for preliminary injunction is granted, as well
13 as to allow plaintiffs to better respond to factual
14 issues raised by the defendants in either their
15 response to the motion for preliminary injunction and
16 the hearing itself. And I'll discuss that a little bit
17 more at length later.

18 I feel it's important to contextualize the
19 moment in which we find ourselves. Executive Order 35
20 was issued just 90 days before Election Day creating
21 the escalated purged program and revealing the scope of
22 the prior purges.

23 Plaintiffs immediately undertook, Your Honor,
24 a good faith effort to obtain information related to
25 the purged program, including through an October --

1 August 20 -- pardon me, August 13 request for
2 information and NVRA letters on August 30, August 20,
3 and October 3.

4 Defendants in response to those letters and
5 those requests for information refused to provide the
6 information despite admitting in a meeting to
7 plaintiffs' counsel that they had information within
8 their possession, and the reason for not providing that
9 information was simply that they do not believe that
10 NVRA required them to provide it for 90 days.

11 THE COURT: Let me interrupt you for a
12 moment. I thought you said in your papers that they
13 provided some limited discovery. Was it at that point
14 or some later point?

15 MS. LEEPER: Yes, Your Honor. It was at that
16 point, and it was limited discovery but certainly not
17 the heart of what plaintiffs have been seeking.

18 THE COURT: What was it that they provided
19 you at that time, or what have you received since you
20 first requested some information on -- I think it was
21 August 13 or whatever the day it was?

22 MS. LEEPER: Yes. That would be the
23 memorandum of understanding between the DMV and Elect.
24 I believe a letter that was sent from Commissioner
25 Beals to the governor that was the certification of

1 participation --

2 (Reporter clarification.)

3 MS. LEEPER: You know, I said participation,
4 but that's not what I meant to say. What I meant to
5 say is the certification of compliance with the
6 procedures that are required by Virginia law, including
7 the executive order.

8 THE COURT: All right. So those two things,
9 and that's practically it?

10 MS. LEEPER: Your Honor, I'm going to be
11 honest with you. I believe there's at least one other
12 thing that I am not remembering at this moment. But
13 what I can tell you is that it did not at any point
14 include the list of purged voters. It did not include
15 the voter file as requested so that we can understand
16 who has been removed by the program. And it did not
17 include information about how the purged program is
18 functioning in operation.

19 THE COURT: Thank you.

20 Let me maybe move ahead, or maybe it happened
21 at this particular meeting. Again, in your papers or
22 the Commonwealth's papers -- I can't remember which --
23 there was an indication that you've all had some
24 meet-and-confer to discuss these things. Is that
25 right?

1 MS. LEEPER: Yes, Your Honor. There were
2 some meetings in relation to the letters that were sent
3 requesting information and also a meet-and-confer that
4 has taken place specifically with regard to this
5 motion.

6 THE COURT: What's your understanding of the
7 government's rationale as to why they didn't produce
8 anything more?

9 MS. LEEPER: Their rationale given at the
10 meeting back regarding the letter was that they are not
11 required to do so for a 90-day period under the
12 National Voter Registration Act. That is not an
13 understanding that we share.

14 THE COURT: Thank you.

15 MS. LEEPER: Your Honor, in response to
16 defendants' refusal to provide the core of the
17 information that plaintiffs have been seeking since
18 August, plaintiffs have had to undertake a diligent
19 investigation as to the extent of the purged program
20 and the effect that it was having on voters given the
21 public record.

22 After doing so and when it became clear that
23 the purged program was, in fact, unlawfully removing
24 voters in a systematic manner, plaintiffs filed this
25 complaint on the first day permissible of the NVRA's

1 30-day preelection period and filed this motion the day
2 after.

3 Plaintiffs could not confer with defendants'
4 counsel before the filing of that motion because
5 despite having sent a courtesy copy to the attorney
6 general's office of the complaint, no counsel had
7 entered an appearance at that point. However, as you
8 just noted, we have since met with defendants' counsel,
9 have engaged in negotiation regarding narrowing the
10 limited request even further, and no response was
11 received from defendants to plaintiffs' proposal.

12 THE COURT: So prior to filing the lawsuit,
13 when you had meetings with the Commonwealth, no lawyers
14 participated; that was just the, if you will, clients?

15 MS. LEEPER: Lawyers were participating in
16 the meetings prior regarding the letters requesting
17 information as well.

18 THE COURT: All right. Thank you.

19 MS. LEEPER: Your Honor, there are two
20 possible tests that you could apply in assessing our
21 motion here. The one that many courts have adopted is
22 the reasonableness or good cause test, and a minority
23 approach would be to modify preliminary injunction
24 standards. Plaintiffs meet the burden under either
25 test.

1 First, addressing the reasonableness or good
2 cause standard, the first question that the Court must
3 ask is whether the procedural posture weighs in favor
4 of plaintiffs, and here it obviously does. There is a
5 pending motion for preliminary injunction.

6 A hypothetical motion to dismiss cannot
7 overcome the reality of a preliminary injunction motion
8 to be considered by the court this Thursday. We are
9 currently 15 days before the election, and that is due
10 to plaintiffs' good faith efforts to obtain this
11 information outside the scope of litigation and
12 defendants' refusal to provide that information.

13 The second question to consider is whether
14 the discovery at issue is narrowly tailored to obtain
15 information that is probative to the preliminary
16 injunction analysis, and here the information is
17 narrowly tailored. There's a low burden to produce the
18 information already admitted by defendants to be in
19 their possession, which they are required to maintain
20 and make available under the National Voter
21 Registration Act.

22 THE COURT: How do you perceive using this
23 particular information that you're seeking on Thursday
24 as opposed to some later date?

25 MS. LEEPER: Thank you, Your Honor. I'm glad

1 that you asked that. I can give one chief example, and
2 that is that defendants have in their response here, in
3 public statements, in a memo by the governor's counsel
4 claimed that the program is not systematic in nature.

5 THE COURT: It's individualized.

6 MS. LEEPER: That it's individualized,
7 precisely. However, the public record and, as you say,
8 the evidence that we've put before the Court is already
9 sufficient to show that it is a systematic process and
10 purge in violation of the NVRA.

11 However, at this moment, because defendants
12 are refusing to provide information to the plaintiffs
13 that they have requested for weeks now, months, they
14 have the opportunity to pick and choose beneficial
15 information to them from information that is solely
16 within their control that plaintiffs have no means of
17 accessing.

18 And so plaintiffs find themselves in a
19 fundamentally unfair posture, and the court finds
20 itself in a position where it doesn't have the full
21 record before it in able to access how this program is
22 actually being carried out, just uncited assertions by
23 defendants.

24 Your Honor, as I noted, this request is
25 narrowly tailored, and plaintiffs are willing to

1 narrowly tailor it even further as we discussed before.

2 The third factor, Your Honor, is whether the
3 requesting party would be irreparably harmed by waiting
4 for discovery, and here, of course, 15 days out from
5 the election, the irreparable harm is not just imminent
6 but, in fact, ongoing. Right now plaintiffs are
7 diverting resources from their core purposes, which are
8 most active during this close election period, of
9 getting out the vote of informing voters of the issues
10 before them and instead have had to divert those
11 resources towards ensuring that the members of the
12 public and their members, plaintiffs' own members, who
13 are naturalized citizens in particular, are not being
14 purged from the rolls, have not been purged, or if
15 they've been purged, that they know how they can
16 reregister.

17 Your Honor, there's also the voters -- and
18 many of whom I'm sure could be members of plaintiffs'
19 organizations -- who have been purged from the rolls
20 and may not even know it but have sent in an absentee
21 ballot and have no way of knowing that their ballot is
22 going to be denied.

23 And then, Your Honor, there's, of course, the
24 voters who may be dissuaded or intimidated by the
25 threat of prosecution. And even if they know that they

1 are citizens and have a right to register to vote will
2 not reregister for fear of that prosecution. This harm
3 is, of course, irreparable, the fundamental right to
4 vote will be denied, and it is imminent.

5 Finally, Your Honor, the last factor is
6 whether the documents or information sought will be
7 unavailable or subject to destruction. And here that
8 is not necessarily the case, but that factor is not
9 dispositive, especially in this posture where there's a
10 pending motion for preliminary injunction, and making
11 this information later available would do nothing to
12 remedy the imminent ongoing irreparable harm.

13 Your Honor, even if you were to apply the
14 modified preliminary injunction standard, plaintiffs
15 would still prevail. The question is whether the
16 movement -- the movant has made a sufficiently
17 colorable claim under its cause of action to justify
18 limited expedited discovery.

19 Defendants claim that it should, in fact, be
20 more of a full preliminary injunction standard where
21 you show a strong showing of success on the merits and
22 irreparable harm.

23 And in either case, again, plaintiffs meet
24 that burden. As we explained, the harm -- irreparable
25 harm is clear here. And there is clearly by all the

1 evidence that is in the record -- setting aside uncited
2 assertions to the contrary -- sufficient evidence to
3 show that there is a systematic purge taking place
4 within the 90-day window banned by the NVRA.

5 Your Honor, as I've said, plaintiffs will
6 prevail under either the reasonableness and good cause
7 standard or the modified preliminary injunction
8 standard, and we respectfully request and urge this
9 Court to grant plaintiffs' motion.

10 I welcome any further questions the Court may
11 have.

12 THE COURT: Thank you, Ms. Leeper.
13 Mr. Sanford.

14 MR. SANFORD: Thank you, Your Honor.

15 And while we aren't here today on the
16 substance of the case, I don't want to let my friend on
17 the other side's remarks go uncommented upon about
18 referring to the purge program. There is not a purge
19 program. There is an individualized process in place.
20 And the use of this raised purged program, I think, for
21 the issue that is before us today, discovery, is not
22 helpful because it's exceptionally ambiguous on what
23 they're actually referring to.

24 This process was established in 2006 under
25 Virginia law. If we're just referring to this

1 nebulous, quote/unquote, purge program, it's incredibly
2 unclear what they're actually seeking information about
3 and at what time period they're looking to, whether
4 this stretches back to 2006 or if they're more focused
5 on the executive order.

6 THE COURT: Well, you may have a point for
7 Judge Giles on Thursday or maybe for a motion to
8 dismiss or down the line. But I think what we're
9 talking about here, limiting our discussion today to
10 those issues -- and obviously, you can chat with me
11 about anything you'd like. But I think my questioning
12 of counsel seems to be that they're now limiting their
13 request for discovery to information since the issuance
14 of Executive Order 35. Would you agree?

15 MR. SANFORD: Yes, Your Honor, I think that
16 is what they are now limiting it to. But the use of
17 the language -- I think we need to use the more precise
18 language of information post Executive Order 35 as
19 what's actually --

20 THE COURT: You changed it to term "purge
21 program"?

22 MR. SANFORD: Yes, Your Honor, and I think
23 it's inaccurate and it's not useful for our
24 conversation to reflect the materials that we are
25 actually talking about, which is a far more limited

1 scope.

2 And, Your Honor, even that more narrow
3 request is plainly not available in this case for three
4 main reasons. And I think, you know, the briefing in
5 this has really set forth the standards and gone
6 through a lot of the arguments. So I just want to
7 focus on kind of three points that, I think, permeate
8 the analysis, you know, regardless of which standard
9 you've used and which test you're applying and really
10 kind of influences all of the factors under each.

11 And the first of those is that the requested
12 discovery here is inappropriate because it's not needed
13 to litigate the preliminary injunction, which is the
14 only suggested basis for having expedited discovery in
15 this case.

16 THE COURT: Well, tell me why. I mean,
17 they -- you just heard from Ms. Leeper and you've seen
18 in their papers that they're trying to challenge the
19 defendants' argument that this is systematic versus
20 individualized. And isn't it necessary -- isn't the
21 root of the issue here trying to have the evidence
22 before the court that Judge Giles needs on Thursday to
23 truly evaluate that argument?

24 MR. SANFORD: Yes, Your Honor. And I think
25 three responses to that, and the first is answering a

1 question, I think, that you asked about what
2 information were they already provided in response to
3 their FOIA request to the Department of Elections. And
4 I just want to walk through everything that they've
5 already been given in this case. Because I think --
6 you know, they refer to this as saying that the
7 department stonewalled them. That is not the case
8 whatsoever.

9 So I think first -- the first thing that they
10 received is the voter registration list maintenance
11 standard operating procedure for the Department of
12 Motor Vehicles, full State Board of Elections, and
13 non-citizen files. So they would be standard operating
14 procedures.

15 THE COURT: You're looking at something. I
16 assume -- that looks like something that I looked at as
17 well. Is that the information from the website?

18 MR. SANFORD: This, I believe, is not from
19 the website.

20 There's also information that is on the
21 website, Your Honor, that is publicly available
22 information, like the GREB handbook, that anyone can
23 access online. There's the annual list maintenance
24 report that can also be accessed online. And also, a
25 lot of these materials, Your Honor, were attached to

1 their preliminary injunction motion or to the complaint
2 or to the Department of Justice's complaint or
3 preliminary injunction motion. This information is out
4 there. They already have it.

5 THE COURT: I guess I was focused on the
6 client services page on your website about what's
7 generally available to the public.

8 MR. SANFORD: So there's generally available
9 things as well, and then there's also these materials
10 that were specifically given to these plaintiffs in
11 response to their request for information prior to this
12 litigation.

13 THE COURT: I'm sorry. Start that list for
14 me again. What was the first thing you identified?

15 MR. SANFORD: So the first thing is the voter
16 registration list maintenance, Department of Motor
17 Vehicles, full State Board of Elections and noncitizen
18 files standard operating procedures.

19 THE COURT: What's the date of that?

20 MR. SANFORD: So the date of this -- the
21 revision date is 2024-08-08.

22 THE COURT: August 8, 2024?

23 MR. SANFORD: Correct.

24 THE COURT: Wasn't there a new MOU, though,
25 that was executed after that?

1 MR. SANFORD: Yes, Your Honor. So these are
2 the -- kind of the -- I was walking through the two
3 internal -- or three internal documents first. They
4 were also provided all of the relevant MOUs. There's
5 the MOU between the Department of Motor Vehicles and
6 the Department of Elections. Which that new MOU, that
7 was also provided to them.

8 They were also given the MOU, the new one
9 between the Virginia State Police and the Department of
10 Elections because they also have relevant information.

11 They were also given the memorandum of
12 understanding between the Department of Health and the
13 Virginia Department of Elections.

14 And then along with those MOUs, they were
15 also given more internal documents, including the --
16 this is called the hopper processing and information
17 step-by-step instructions. And the hoppers are kind
18 of -- the electoral system in Virginia, they use a
19 hopper process for kind of processing information from
20 the Department of Elections to general registrars. And
21 when something is in your hopper, you take action on
22 it. So this is kind of the technical step-by-step
23 instructions that they received.

24 They also received the step-by-step
25 instructions to add or update voter information.

1 They received, of course, Executive Order
2 No. 31, which kind of -- and you also have Executive
3 Order 35, which --

4 (Reporter clarification.)

5 MR. SANFORD: They also received Executive
6 Order 31, Executive Order 35, which sets forth the
7 process for how this kind of individualized inquiry
8 works.

9 And of course, while they weren't provided
10 this in response to the FOIA request, they also have
11 the sections of Virginia Code, which, I believe, are at
12 24.1 -- oh, I'm sorry, 24.2-427 and 24.2-410.1, which
13 in the code it sets out a step-by-step process. This
14 is the process that's been there since 2006. That kind
15 of lays it out step-by-step what you do, what
16 information is transmitted, what everyone is required
17 to do under the system. That is all clearly -- you
18 know, it's the Code of Virginia. It is available to
19 them. They have it.

20 Now, in addition to the documents that they
21 were sent, there's the publicly available information
22 that, I think, Your Honor was referring to already, and
23 there's -- you know, that includes the general
24 registrar's handbook. That's posted online. It was
25 attached to the DOJ complaint, who is also a plaintiff

1 in this consolidated action.

2 And there's also -- and this is referenced in
3 their complaint -- the full testimony is attached as an
4 exhibit to the DOJ complaint. Commissioner Beals gave
5 public testimony to the House committee's -- the
6 committee on privileges and elections had a hearing on
7 this back on September 4 where she walked through the
8 process with the House, answered questions from the
9 House of Delegates, explained the process. And that,
10 too, is entirely publicly available, the entire clip --
11 the entire hearing, the video of it, is online as
12 attached to the DOJ complaint.

13 So they want -- you know, they're talking
14 about taking a deposition of Susan Beals wanting to ask
15 her questions. She's been asked questions about this
16 already, and it's fully available to them.

17 And on top of all of this, plaintiffs
18 notified the court on Friday afternoon that they now
19 have witnesses that they want to call who -- they
20 haven't disclosed who those witnesses are, but they
21 have witnesses that they want to call at the hearing on
22 the preliminary injunction.

23 So I think at the end of the day, it's fairly
24 clear that they have -- on a preliminary injunction on
25 a very expedited timeline, they have the discovery that

1 they need. They have the information that they need to
2 make their arguments.

3 THE COURT: Well, let me ask you about that.
4 I think the things you've identified are standard
5 operating procedures, MOUs, copies of the two executive
6 orders, the code sections, and some other publicly
7 available information.

8 I think the root of the issue, at least as
9 alleged by the plaintiffs in their complaints, are the
10 number of people, if any, who were registered voters
11 who have been removed since August 7, 2024. What
12 information have you provided them about the number,
13 identity, and reason for those folks being removed from
14 the voter rolls?

15 MR. SANFORD: So that information has not
16 been provided.

17 THE COURT: Isn't that what this is all
18 about?

19 MR. SANFORD: No, Your Honor. Respectfully,
20 I say that that information is ultimately not relevant
21 to the preliminary injunction. What they are seeking
22 with respect to that information is the identities --
23 and maybe they're moving away from kind of all of the
24 far breadth of information they wanted on every single
25 individual. But the identities of the people who have

1 been removed following the noncitizen individual
2 investigation process.

3 THE COURT: I think they'd stipulate to that.

4 MR. SANFORD: So the -- those people are --
5 them -- plaintiffs having those identities are not
6 relevant to the preliminary injunction, the merits of
7 the --

8 THE COURT: Oh, gosh, don't you think it's
9 relevant to the inquiry, one, whether anyone has been
10 removed or, if so, the volume of people who have been
11 removed -- they say improperly. I guess that's to be
12 determined.

13 MR. SANFORD: Well, Your Honor, I think the
14 volume -- the challenge here is to the -- what the
15 process is. It's not a challenge to the number. I
16 don't think plaintiffs would say, oh, if it's a low
17 number, then our preliminary injunction fails, or if
18 it's a high number, our preliminary injunction
19 succeeds.

20 THE COURT: Well, I suspect that if they're
21 successful, that they may ask in terms of relief -- and
22 I would think that the court would have some interest
23 in knowing some data about this before she rules --
24 that they may want some reinstatement, or they may want
25 some remedy that relates to the people who have been

1 removed from the list. And the identity of these folks
2 would be useful both in evaluating the issues as to
3 whether or not there's an issue that deserves a
4 preliminary injunction and, if so, how a remedy might
5 be fashioned.

6 MR. SANFORD: Yes, Your Honor. And I think
7 that actually kind of hits the nail on the head about
8 why, if this information is relevant -- and I think
9 plaintiffs have kind of acknowledged this -- it only
10 goes to the remedy or to the relief.

11 And if you look at what plaintiffs are
12 actually asking for in their own proposed order on the
13 preliminary injunction, there is no need for plaintiffs
14 to have individualized information about these
15 individuals. Because what they're asking for -- and
16 this is ECF No. 26-27.

17 THE COURT: What are you referring to?
18 What's that document?

19 MR. SANFORD: That's the proposed order that
20 plaintiffs filed with their preliminary injunction
21 motion.

22 THE COURT: Okay.

23 MR. SANFORD: It would direct, "Defendants
24 Beals and State Board of Election Members shall
25 instruct all Virginia county registrars to send letters

1 to affected voters retracting the notice letters
2 already sent out...."

3 All of the relief is directing the defendants
4 to make some kind of communication or announcement to
5 these individuals. None of it involves plaintiffs
6 reaching out to these individuals or making contact
7 with them.

8 I think it's, you know, kind of clear from
9 their opening brief that plaintiffs are hoping to use
10 this information essentially as their own mailing list
11 to contact these individuals.

12 THE COURT: Well, couldn't it also be used to
13 challenge your argument that it's an individualized
14 effort that you've undergone versus a systematic one?

15 MR. SANFORD: No, Your Honor, I don't think
16 it would be relevant to that because that vote -- that
17 analysis focuses on what process is being used, not
18 about, you know, who the particular individual is. And
19 so, Your Honor, it -- you know, who the particular
20 individual is. And those individuals aren't parties to
21 this case notably. It is not relevant to the -- kind
22 of the heart of the issue here, which is whether or not
23 the process is being followed here is systematic or
24 individualized. That's a question about the
25 defendants.

1 THE COURT: Yeah. I mean -- but I think
2 there is something to the plaintiffs' argument here,
3 that if you focus entirely on process and then claim
4 that you're engaging in an individualized effort, that
5 perhaps it's not exactly hitting the mark, that it must
6 at least be relevant on some level, or it might be
7 important to analyzing the issue who was removed, why
8 they were removed, if they share common characteristics
9 or the like.

10 MR. SANFORD: Well, Your Honor, that's not an
11 argument that is presently before the Court on the
12 preliminary injunction on this Thursday. I think this
13 sort of brings kind of, you know, the first
14 consideration here and the first issue, just that this
15 information, you know, is not necessary for litigating
16 the preliminary injunction.

17 But there's two more reasons why the
18 discovery shouldn't be provided in this particular case
19 in this particular posture.

20 THE COURT: Go ahead.

21 MR. SANFORD: The second of which -- and this
22 is something that plaintiffs do not respond to in their
23 reply brief -- is that the defendants in this case from
24 the private plaintiff suit have sovereign immunity from
25 this action. And sovereign immunity is not just a

1 defense to the merits of a claim. It is an immunity
2 from the suit. It's very well-established that when
3 you have sovereign immunity, you are also immune from
4 the burdens of the suit, including discovery.

5 Now, in their reply, plaintiffs refer to,
6 generally speaking, motions to dismiss do not
7 automatically stay discovery. But that's not the issue
8 here.

9 The issue here is that the motion to dismiss
10 and the defense would be based upon the sovereign
11 immunity of these defendants. That sovereign immunity
12 has to be resolved prior to a court subjecting a
13 potentially immune defendant to discovery.

14 And so because of that bar to this case where
15 they -- and opposing counsel has not offered an
16 argument against a sovereign immunity defense here.
17 Discovery cannot proceed even if it would be
18 potentially relevant.

19 And third -- and I think this is sort of a
20 lone dispositive as a practical matter -- there simply
21 isn't time to engage in the discovery that plaintiffs
22 seek in advance of the preliminary injunction hearing.
23 I think the timeline here is brisk to put it mildly.

24 THE COURT: Before you move on to the
25 timeline, I just want to ask you to follow up a little

1 bit about your second point. Are you aware of any
2 authority in National Voter Registration Act cases
3 where a preliminary injunction was pending, that the
4 court denied expedited discovery on the ground of
5 sovereign immunity?

6 MR. SANFORD: I am not aware of a case where
7 the sovereign immunity defense has been waived, Your
8 Honor, in response -- sorry, I believe I just said
9 "waived." I meant to say "raised." Where sovereign
10 immunity was raised as a defense in the preliminary
11 injunction -- in the preliminary injunction context.
12 I'm not aware of that.

13 THE COURT: That clearly would be helpful to
14 analyzing the argument as to whether or not I ought to
15 consider sovereign immunity before authorizing
16 expedited discovery when you have a preliminary
17 injunction based on the specific act with somewhat
18 specific deadlines.

19 MR. SANFORD: Well, Your Honor, I think it
20 would create kind of a perverse incentive for
21 plaintiffs to delay filing cases, file motions for
22 expedited discovery to then end-run a defense of
23 sovereign immunity that they would know would be
24 raised.

25 THE COURT: Well, similarly, one could argue,

1 if one were skeptical, that it's also a perverse
2 incentive to allow someone to stand behind that when
3 there's a tight deadline.

4 MR. SANFORD: Well, Your Honor, but I think
5 here it's -- you know, the Court can kind of evaluate
6 on its -- you know, look at the sovereign immunity
7 defense that's being raised. You know, we didn't just
8 say, oh, we will raise sovereign immunity. We kind of
9 set out in the brief why we're raising sovereign
10 immunity, what the argument looks like.

11 The point is that there is no statutory
12 waiver of the immunity here. They need to rely on Ex
13 Parte Young. They haven't made a showing that they can
14 satisfy the narrow exception to sovereign immunity in
15 Ex Parte Young. And so due to that, we have a
16 sovereign immunity defense that, you know, I think
17 is -- seems to be teed up in our opposition to the
18 preliminary injunction motion, teed up in our motion to
19 dismiss.

20 I think it would be improper and, you know,
21 kind of put the cart before the horse to say we're
22 going to order discovery before we determine whether
23 plaintiffs raising a sovereign immunity defense have
24 sovereign immunity. I think kind of -- you know, the
25 Fourth Circuit has been, you know, clear about this

1 kind of more generally speaking that sovereign immunity
2 is the defense to discovery -- sorry, is an immunity
3 from discovery as well. It's not just a defense to the
4 case. And so because of that, you have to resolve the
5 sovereign immunity issue first before kind of being
6 able to jump the gun and go into discovery, Your Honor.

7 THE COURT: I understand your position. You
8 can move on to point three.

9 MR. SANFORD: And the third point is -- you
10 know, this is really just as a practical matter. There
11 is not time to engage in the discovery that plaintiffs
12 are seeking here. The timeline is -- I think I was
13 just saying quite brisk. We're, you know, already in
14 the middle of the day on Monday. You know, we'll be,
15 you know, in court until we wrap up this hearing.
16 We'll then need to travel back to Richmond. Our brief
17 opposing not just plaintiffs' preliminary injunction
18 motion but also the preliminary injunction motion of
19 the United States is due tomorrow at 3:00 p.m. We then
20 have one day, Wednesday, to prepare for a hearing on
21 Thursday morning at 10:00 a.m.

22 THE COURT: I know there's a lot of good
23 lawyers in the Office of the Attorney General.

24 MR. SANFORD: Well, Your Honor, I think --
25 you know, I wish that we had the resources of my

1 friends on the other side here. You know, I note that
2 I think they had, you know, maybe 14 lawyers on brief.
3 I would love to have those kind of resources in the
4 Office of the Attorney General, Your Honor.

5 THE COURT: Well, answer me this. I mean,
6 you've known about this request for discovery since the
7 middle of August. Why haven't you produced anything or
8 provided any of this information before? You must've
9 known this was coming.

10 MR. SANFORD: Your Honor, so I think the
11 middle of August that they're referring to is kind of
12 like the equivalent of an NVRA and FOIA request that
13 was made to the Department of Elections, to which the
14 Department of Elections responded with quite a few
15 documents and then also said that they were responding,
16 according to their normal practice during election
17 season, within 90 days on other information.

18 THE COURT: But isn't that kind of rich when
19 you know that the election is going to be over by then
20 and this whole case is about the election?

21 MR. SANFORD: Well, I mean, Your Honor, I
22 think -- you know, the Department of Elections needs to
23 follow its standard process and especially -- during
24 election season, Your Honor, this is not the only FOIA
25 request, the only NVRA request that they get. They get

1 dozens and dozens and dozens of these requests. They
2 need to respond to them in order and especially with,
3 you know, the Virginia -- I think kind of -- the aspect
4 of this that plaintiffs are complaining about are the
5 NVRA parts of the request, not the FOIA parts of the
6 request.

7 I think -- as Your Honor might be familiar
8 with Virginia FOIA, it is incredibly accelerated
9 timelines of, you know, five days to respond with a
10 possible seven-day extension.

11 THE COURT: I'm well aware.

12 MR. SANFORD: So the department is forced to
13 prioritize -- or not prioritize. But to stay in
14 compliance with the FOIA requests, you have to move
15 very quickly on those aspects of requests, which is
16 what they're doing. They --

17 THE COURT: Did they request an extension on
18 this case?

19 MR. SANFORD: On the FOIA?

20 THE COURT: Yes.

21 MR. SANFORD: I am not aware if they
22 requested an extension prior to producing these
23 documents, but they did produce the documents in
24 response to FOIA.

25 THE COURT: Okay.

1 MR. SANFORD: So, you know, there's just the
2 practical realities of, you know -- and kind of similar
3 to how I would love to have more attorneys to be able
4 to put on this case, I'm sure the Department of
5 Elections would love to have more FOIA officers and
6 records officers who they could have responding to kind
7 of the flood of requests that they get, especially
8 during election season where everyone is looking for
9 information from them, you know, not just about, you
10 know, this issue but about plethora of issues.

11 It's just the practical realities of, you
12 know, government has to go step-by-step through its
13 processes in order to respond to these requests. And
14 just like how, you know, the state government -- and
15 I'm sure the, you know, taxpayers would be happy about
16 it -- we can't throw 14 lawyers at every case that
17 comes in.

18 And so we will be, I think, substantially
19 burdened and substantially prejudiced if we're ordered
20 to respond to discovery that the plaintiffs are seeking
21 while we're trying to prepare for the preliminary
22 injunction hearing and file our preliminary injunction
23 opposition brief in the next two days. You know, I
24 think we're dealing with a schedule that's measured in
25 a matter of hours, not a matter of weeks.

1 And I think -- you know, my friends on the
2 other side referred to the case down in Alabama, which
3 I think really kind of hurts their argument here. In
4 that case, the plaintiffs filed suit on September 13.
5 The court granted very, very limited discovery on
6 October 1, and that was mainly directing the defendants
7 to provide the information that they had given to the
8 DOJ, to also send it to the private plaintiffs in that
9 case. But there, the PI hearing wasn't happening until
10 October 15. So the PI hearing was two weeks after the
11 order on expedited discovery, Your Honor. This is --
12 you know, again, that's a schedule measured in weeks.
13 We're dealing with a schedule that is best measured in
14 hours at this point.

15 For us to go kind of off on this, you know,
16 side project of dealing with the plaintiffs' discovery
17 requests here, every hour that we spend on that,
18 especially if we spend, you know -- or try to spend
19 hours preparing someone for a 30(b)(6) deposition and
20 then taking a 30(b)(6) deposition, I mean, that's going
21 to take at least a full day, if not more. There's just
22 simply no way it can be done.

23 Or if we're searching for broad document
24 requests, you know, we're going to need to develop
25 search terms, run search terms, review documents for

1 responsiveness, and then review them for privilege, you
2 know, review them for any necessary redactions, and
3 then actually make a production. I don't see how this
4 could possibly be done prior to the preliminary
5 injunction hearing. And it certainly couldn't be done
6 in time for plaintiffs to review it and incorporate it
7 into their arguments and us to then respond to it.

8 And so I think this really, you know, brings
9 us back to the point that the Supreme Court of the
10 United States made in *Granny Goose Foods*, which is 415
11 U.S. 423, in Footnote 7. And that explained that the
12 notice requirement required by Rule 65(a) before
13 preliminary injunction can issue implies a hearing in
14 which the defendant is given a fair opportunity to
15 oppose the application and to prepare for such
16 opposition.

17 If we're forced to go off on this kind of
18 side issue and devote our resources to discovery
19 instead of preparing for the preliminary injunction
20 hearing, that substantially prejudices us and, I think,
21 violates Rule 65(a).

22 THE COURT: Well, I mean -- Rule 65(a), I
23 don't have it in front of me, but I've heard the
24 portion you just read to me spoke in terms of discovery
25 that you might have to engage in. But in this case,

1 we're talking about effectively data and numbers that
2 largely, I'm guessing, is coming from the Department of
3 Elections. And I'm not so naive as to think it's just
4 a matter of pressing a button, but it's all data that's
5 already within your exclusive possession, custody, and
6 control. And that's what the limited ask here is, is
7 for that data. And I just don't see this as an issue
8 of you having to learn new information. This is all
9 information that I suspect you or someone within the
10 departments who are running these programs are fully
11 aware of.

12 MR. SANFORD: Well, Your Honor, I think it
13 depends on which part of their request --

14 THE COURT: Let me ask you this: Does a
15 document exist that has the current numbers to date of
16 folks who have been disenrolled from this program?

17 MR. SANFORD: The current numbers to date? I
18 would need to confer with the client on whether that
19 particular document --

20 THE COURT: I suspect that information that
21 they're looking for is information that is not too
22 difficult to gather. So I appreciate your argument
23 about the hours to deal with, and I appreciate your
24 argument about what burden it may impose on you
25 depending on, obviously, the scope of the order. But I

1 suspect that an order can be crafted that limits the
2 scope of discovery to issues that are important and can
3 be raised with the court so the court can evaluate
4 whether or not she believes this is an issue that
5 requires a preliminary injunction and some remedial
6 relief or not.

7 I just don't view this as the sort of parade
8 of horrors that you're suggesting. Now, obviously,
9 you don't know what I may rule, and that's perfectly
10 appropriate. But that's sort of the viewpoint from
11 which I'm coming right now.

12 MR. SANFORD: Yes, Your Honor. And I think
13 kind of if -- you know, if there's very, very narrow
14 discovery -- I think much narrower than even what
15 plaintiffs are asking for today, you know, possibly
16 that can be done. You know, I think the scope of --
17 you know, when they kind of in their initial motion,
18 you know, ask for like each, you know, list of
19 individuals to include like seven different pieces of
20 information about that individual, that is something
21 that I know the Department of Elections would need to
22 write new code to try and pull all of that together.
23 And so if you're going very broad on what's being
24 provided, like that is something that I don't think can
25 be done. I think kind of far more narrower things are

1 maybe possible.

2 But on the issue -- I think especially
3 with -- you know, there's kind of maybe this -- the
4 request for, you know, the number of people who have
5 been subject to this individualized review process
6 since Executive Order 35 may be in one bucket, and then
7 you also have this bucket of they just want a
8 generalized request for documents that go to the
9 process.

10 That calls for kind of -- you know, you
11 actually have to do a search for that kind of thing.
12 That's not a, you know, discrete data point to say,
13 yeah, you know, here's the folder that has everything
14 that has anything to do with this. You need to, you
15 know, run a search and actually review documents to
16 determine what's responsive. That's not something that
17 can be done kind of at the -- you know, the snap of a
18 finger. So, Your Honor, I think it really is -- you
19 know, whether this is feasible or not would very much
20 depend on the scope of what is being ordered.

21 And I do just want to return to the point
22 about plaintiffs claim that they need to know the
23 identities of the individuals since Executive Order 35.

24 First, it would appear that that information
25 may not be exclusively in our control because I believe

1 plaintiffs have represented that they have contacted
2 all the individuals from before Executive Order 35 or
3 sent mailings out to them. So somehow they have
4 derived that information, in which case it seems like
5 they are able to derive this information from public
6 information and don't need to be receiving it from the
7 defendants and having kind of us expend our resources
8 to answer their questions on that.

9 But secondly, again, that information goes to
10 the relief that might be afforded if they were to
11 prevail on the preliminary injunction, and that relief,
12 as it's stated in their own proposed order, would run
13 through defendants sending communications.

14 I think it would be a very bad idea for
15 plaintiffs to be sending their own communications to
16 these individuals, especially sending communications
17 before we have a ruling on the preliminary injunction.
18 Because then we risk creating, I think, a lot of
19 confusion if these individuals start receiving multiple
20 communications that are potentially inconsistent or, at
21 worse, contradictory. And they are possibly getting
22 some very bad advice.

23 If we prevail on the preliminary injunction
24 motion, these noncitizens might be getting advice that
25 they should, you know, go show up and vote. And that

1 is not something that, I think, anyone would want to
2 wrongly encourage them to do and maybe cause them to
3 make an error that they would not have otherwise made.

4 So unless Your Honor has any further
5 questions, I ask that the motion be denied.

6 Thank you.

7 THE COURT: Thank you, Mr. Sanford.

8 Ms. Leeper, would you like to respond?

9 MS. LEEPER: Yes, Your Honor.

10 Your Honor, I'd like to respond to each of
11 opposing counsel's three primary points, the first
12 being the assertion that this is not information needed
13 to litigate the motion for preliminary injunction and
14 that it is only needed to fashion a remedy or relief.

15 Your Honor, first, even if it were only
16 needed to fashion a remedy or relief, that is relevant
17 for what this court will consider and potentially take
18 action for on Thursday, but that is not the case.
19 Defendants' counsel focused on how the identities of
20 those purged would not go to the systematic nature of
21 the purge, and I take issue with that. But it also
22 surely goes to the irreparable harm, which is being
23 faced by voters and by plaintiffs.

24 In terms of how that information could be
25 used to assess whether or not there is a systematic

1 impact, by way of example, Prince William County has
2 identified voters who had previously affirmed their
3 citizenship up to five times who were nonetheless
4 removed because of the systematic nature of this purge.

5 Now, plaintiffs are unable to do their own
6 similar type of analysis or to understand the extent to
7 which that is the case across the full list of voters
8 purged because that list has been denied to them. And
9 so that information is relevant for the irreparable
10 harm for assessing systematic nature and for assessing
11 the remedy.

12 To the second point about sovereign immunity,
13 Your Honor, defendants' counsel made a lot of
14 assertions about what is or isn't before this Court or
15 what is or isn't relevant for the preliminary
16 injunction hearing. But what is certain is that there
17 is not a motion to dismiss before this Court. There is
18 not a motion to dismiss for any reason, including
19 sovereign immunity.

20 THE COURT: Well, how do you respond to
21 counsel's argument that folks who enjoy sovereign
22 immunity may also be protected from discovery when they
23 may enjoy sovereign immunity?

24 MS. LEEPER: Well, Your Honor, I think that
25 defendants' counsel referred to perverse incentives,

1 and that is what would happen here in terms of delaying
2 providing documents until the last moment so that
3 plaintiffs have no choice but to seek information and
4 seek litigation and challenge under the National Voter
5 Registration Act until what is a late hour. And then
6 defendants would just be able to raise a sovereign
7 immunity defense without providing any actual briefing
8 on that matter leaving plaintiffs without the ability
9 to have relief.

10 Your Honor, it's also instructive that there
11 have been many cases in the past under the National
12 Voter Registration Act, including one very recently,
13 like the one in Alabama, which indicates just such as
14 this and in which the court granted an expedited
15 limited discovery request and ultimately found in favor
16 of the plaintiffs.

17 Your Honor, to the last point about the lack
18 of time or the feasibility of producing this
19 information, the timeline, as the Court properly
20 identified, is not from today until Thursday. This
21 timeline began back in mid August and, even generously,
22 13 days ago when this motion was filed. Defendants
23 cannot now claim surprise that plaintiffs are seeking
24 this information.

25 In fact, plaintiffs have already, through

1 their attempt to negotiate with defendants about
2 narrowing the scope of discovery, narrowed in on
3 precisely the key information which is sought by
4 plaintiffs now. So defendants were even on notice of
5 which of the information was the most integral and
6 which plaintiffs would be certainly seeking.

7 Your Honor, defendants' counsel also noted
8 that this Commonwealth needs to follow the standard
9 process for producing information, and what that
10 emphasizes is that there is a standard process here.
11 There is a regular process by which the department is
12 in its regular course used to providing this
13 information to voters and to political committees. And
14 that information includes many of the factors which
15 were listed and requested by plaintiffs to be included
16 about these voters.

17 I'm looking at the publicly available website
18 on the Department of Elections website on data
19 available for sale and client services, and a
20 registered voter list already includes the full name,
21 resident's address, mailing address, gender, year of
22 birth, registration date, last registration form
23 received, registration status, locality, precinct,
24 voting district, and voter identification number for
25 voters. This information, most of it is already kept

1 in the regular course and offered for sale for monthly
2 update subscriptions.

3 THE COURT: I just note that it suggests that
4 the process can take up to ten business days.

5 MS. LEEPER: Yes, Your Honor, and it's been
6 13 since this motion was filed and nearly two months.

7 THE COURT: That was my point.

8 MS. LEEPER: Yes. Thank you.

9 Your Honor, also defendants' counsel noted
10 the need to follow the regular course of the FOIA
11 process and ensuring that public information is
12 provided to voters in the order in which it was
13 requested and ensuring that those representations and
14 that information to voters is fulsome.

15 Plaintiffs made that request on August 13
16 under FOIA, and I assure you that we have not received
17 information in a fulsome way. We have not received
18 that information in the regular speedy course in which
19 it is provided. That has been denied.

20 Finally, Your Honor, I would just like to
21 make a point about voter confusion, which was cited by
22 defendants' counsel. And there's nothing more
23 confusing to a voter than being denied their
24 fundamental right to vote, not understanding why this
25 is happening to them and why they're being told or

1 fearful that if they reregister, they may be subject to
2 political -- to criminal prosecution.

3 Confusing is a mild term for what voters are
4 currently experiencing and the irreparable harm that is
5 ongoing. And this discovery is needed in order for the
6 plaintiffs to fully present their case and for the
7 court to have all the information before it so that it
8 can assess the motion for preliminary injunction.

9 THE COURT: Thank you, Ms. Leeper.

10 MS. LEEPER: Thank you, Your Honor.

11 THE COURT: Mr. Sanford, just one more
12 question of you if you don't mind --

13 MR. SANFORD: Absolutely, Your Honor.

14 THE COURT: -- because I'm looking at that
15 website and flagging that ten-day issue. I just want
16 to give you a chance to respond. What was the basis
17 for the Department of Elections or whoever it was who
18 made the decision to state that it needed 90 days to
19 respond to this request for information back on
20 August 13?

21 MR. SANFORD: Yes, Your Honor. So that
22 was -- it takes -- its process is it's 90 days to
23 respond to NVRA requests for information. I think
24 the -- I don't have the website in front of me that
25 you're looking at. I believe that's for the sale of

1 various voter files that is provided by a section of
2 the code that limits it to particular organizations or
3 entities that are allowed to purchase that information.

4 THE COURT: So are you telling me that a
5 certain --

6 MR. SANFORD: I don't think the --

7 THE COURT: Well, hold on. Let me finish my
8 question. Are you telling me that if certain
9 organizations ask for it, it can be produced within ten
10 days if they pay for it but not if anyone else asks for
11 it?

12 MR. SANFORD: Your Honor, I believe that that
13 is a request for a different type of information. I
14 believe that's for like a voter file, not a request
15 for -- of what they're seeking here, is the list of
16 individuals subject to the process to determine if
17 they're a noncitizen registrant. I think those are
18 kind of two different things is my understanding.
19 Again, I don't have the page in front of me of what
20 particular process Your Honor and opposing counsel is
21 referring to right now.

22 THE COURT: I'll tell you, just at least if
23 nothing else for the record, what I'm referring to is
24 the Virginia Department of Elections client services
25 page, which outlines the data for sale, people who

1 qualify, the data included, how to order, and the
2 disclaimer says that the process can take up to ten
3 business days to be completed.

4 MR. SANFORD: Yes, Your Honor. And so I
5 believe that is for a kind of different set of data
6 than what plaintiffs are requesting here. And so
7 there's an existing -- it's always dangerous for
8 lawyers to start getting into technology, but I
9 understand there's like an existing query to pull that
10 information and to be able to generate that to provide
11 is how I understand that works. Whereas if you're
12 creating different lists with all the information that
13 plaintiffs were seeking in their initial motion, that
14 would require writing a new query to pull all that out
15 from various files. And that's kind of where the delay
16 comes in. It's not --

17 THE COURT: There's an established process
18 versus making a custom search?

19 MR. SANFORD: Yeah, you need to come up with
20 the new thing. So I think that's where the difference
21 is. They're not just -- I don't understand them to
22 just be asking for access to what sort of entities are
23 able to purchase. I don't believe that's the request
24 of what they're seeking, Your Honor. And so it's sort
25 of a different process that follows, you know,

1 different timelines. I --

2 THE COURT: I understand. I didn't mean to
3 cut you off. Do you have something more you want to
4 add? Otherwise, I have another question for you.

5 MR. SANFORD: Yeah. The only other thing I
6 was remiss that I didn't mention is just, I think, it's
7 fairly telling, you know, this case has now been
8 consolidated with the action brought by the United
9 States, and I think it's telling that the Department of
10 Justice has not sought any discovery in this action.
11 They didn't even think that a hearing was needed on
12 the -- their motion for preliminary injunction. I
13 think that's revealing, that discovery is not needed to
14 further litigate the preliminary injunction in this
15 case.

16 The information that is needed is known. The
17 parties are able to place their positions, and you
18 know, I think the private plaintiffs don't need to kind
19 of have access to even more to make their case, Your
20 Honor.

21 THE COURT: Well, you very well may be right,
22 and I'm not here to make any arguments for the
23 Department of Justice. But I suspect that a
24 counterargument could be they knew that this was in the
25 works and thought it might be available. But I

1 appreciate your point.

2 Let me ask you another more specific
3 question. I get your point about how the information
4 identified on the client services web page or the
5 Department of Elections may be somewhat specific to
6 various preformulated searches. I suspect that since
7 August 7, 2024, there's been some heightened interest
8 in the folks who may have been removed from the rolls
9 based on Executive Order 35. And I also suspect that
10 there maybe be data that's kept on a regular basis of
11 the people who were removed and their identity and
12 their voter information.

13 Standing here at this podium right now, are
14 you telling me data of that sort, documents of those
15 sort, information of that sort does not currently
16 exist?

17 MR. SANFORD: No, Your Honor, I'm not saying
18 that the -- that that -- I mean, I think you maybe
19 referenced additional data in there but kind of who the
20 individuals are.

21 THE COURT: Yes, sir. If you're making a
22 burden argument, I want to know if there's a burden.

23 MR. SANFORD: Yes. I believe that
24 information exists, Your Honor, and could be -- you
25 know, kind of the more narrow iteration of that

1 information exists. I don't know if it exists in kind
2 of the scope of everything plaintiffs wanted included.

3 THE COURT: What narrow information currently
4 exists?

5 MR. SANFORD: I believe that they would know
6 kind of the individuals who were subject to the
7 individual process for identifying a noncitizen
8 registrant.

9 THE COURT: Well, that's what I figured.

10 MR. SANFORD: Yes, but kind of note -- like
11 noting whether, you know, their full prior registration
12 history and things like that, to pull that all into
13 one, you know, document --

14 THE COURT: What information currently
15 exists?

16 MR. SANFORD: I believe that information
17 exists, Your Honor, the individuals and --

18 THE COURT: What's the "that"?

19 MR. SANFORD: The individuals and, I believe,
20 their addresses, Your Honor, would exist. I think to
21 add information to that -- and that's my understanding
22 from discussions with my client. I haven't kind of,
23 you know, been in the weeds of their database systems
24 and kind of understanding, you know, what is and isn't
25 in there in full, Your Honor. But that's my

1 understanding of what there is.

2 You know, there's kind of records that would
3 link to a voter that maybe you could write a query to
4 pull more information in about them. But I think you
5 would have to kind of go, you know, either with a
6 search or go with individual by individual to try and
7 find that, Your Honor.

8 THE COURT: In support of your burdensome
9 argument, do you want to give me an order of magnitude
10 of what we're dealing with?

11 MR. SANFORD: In terms of pulling all that
12 information?

13 THE COURT: The number of people.

14 MR. SANFORD: Oh, the number. I don't know
15 what the number of people is off the top of my head,
16 Your Honor.

17 THE COURT: Obviously, if you're making a
18 burdensome argument, it would be useful to know that
19 number. But if you want to not tell me that, I
20 understand that as well.

21 MR. SANFORD: Your Honor, I just don't know
22 the number, and so I don't want to represent -- I
23 think, given the attention this case has received, I
24 don't want to say a number up here that turns out to be
25 inaccurate.

1 THE COURT: Understood.

2 MR. SANFORD: I don't know. I don't want to
3 misconvey information, Your Honor.

4 THE COURT: Understood.

5 Unless you have anything else, I don't have
6 any more questions for you.

7 MR. SANFORD: Thank you, Your Honor.

8 THE COURT: You're welcome to add anything
9 you'd like.

10 MR. SANFORD: No. I believe that's all I was
11 hoping to say, Your Honor.

12 THE COURT: All right. Ms. Leeper, I do have
13 one more question for you, and then we're going to
14 stop. We're not going to go back and forth.

15 MS. LEEPER: All day.

16 THE COURT: Any response to anything
17 Mr. Sanford said since you do get the last word, and
18 then I do have a question for you about --

19 MS. LEEPER: Yes, Your Honor, sort of two
20 points of clarification. One is that we are, in fact,
21 seeking the voter files kept in the regular course and
22 produced in the regular course. That is part of the
23 production that plaintiffs are seeking, is that voter
24 file snapshot from August 7 and from present day.

25 THE COURT: Yeah, I saw that.

1 MS. LEEPER: Yes.

2 THE COURT: And maybe I took for granted what
3 that means. So I can make sure that before I impose
4 anything on anyone that I understand the impact of it.
5 What is the voter file snapshot?

6 MS. LEEPER: Yes, Your Honor. So that is on
7 sort of a website that we've been looking at. That is
8 sort of the registered voters list. And so that's that
9 information there as I listed earlier different --

10 THE COURT: Meaning specific names of
11 registered voters as of -- I think you requested as of
12 August 7 and as of some other date.

13 MS. LEEPER: Yes, present day so that we
14 could see when the voters -- you know, which voters
15 were present and then which ones have been removed or
16 since re-added to the list. Yes, Your Honor.

17 THE COURT: Okay. Anything else to add?
18 Otherwise, I have a question.

19 MS. LEEPER: Yes. The second point of
20 clarification -- and I don't know if it's so much
21 clarifying as asking my own question, which is that
22 there was a process by which the state was able to
23 develop the list of 6,303 voters that they claimed in
24 Executive Order 35 were taken off the rolls for alleged
25 noncitizenship. That number was generated in a way.

1 And so to the extent that there already exists a
2 process and a way to parse out this voter or voter that
3 has been removed of this type, it seems that that
4 already exists.

5 THE COURT: I took Mr. Sanford's comments to
6 mean that that does exist. But what exists -- at least
7 as he's informed me, the only thing that exists is
8 their name and their address.

9 MS. LEEPER: Yes, Your Honor. We, obviously,
10 don't have knowledge of the type of information that's
11 included in that. Though it would seem that it would
12 be linked to the general voter file with the additional
13 information because that information is, in fact,
14 needed by the local registrars to perform the matches
15 of the local rolls before they send out the
16 notification.

17 THE COURT: Well, let me ask you this
18 question: If -- for your purposes on Thursday --

19 MS. LEEPER: Yes, Your Honor.

20 THE COURT: -- would you need -- do you need
21 name and address information? And if so, tell me why.

22 MS. LEEPER: Yes, Your Honor. So the
23 information of the actual number of individuals purged,
24 the names of the people that were purged from the voter
25 roll is necessary in order to show a fulsome picture.

1 Because just looking at the snapshot from August 7 and
2 then the snapshot from today would show you who has
3 been removed, but it wouldn't show you potentially who
4 has been removed and has reregistered, which is what
5 would demonstrate that these were faulty and that, in
6 fact, individuals that are citizens are being removed
7 for alleged noncitizenship.

8 THE COURT: Okay. Perhaps I didn't
9 understand the answer to my specific question, which is
10 tell me why you need the name and the address
11 information before Thursday.

12 MS. LEEPER: The name and address
13 information --

14 THE COURT: And subquestion, why couldn't you
15 wait for the voter file information until some later
16 date if Judge Giles enters a preliminary injunction?

17 MS. LEEPER: So the name and address
18 information is needed in order to understand who
19 there's been a notification sent out to, who has been
20 notified that they could be removed for alleged
21 noncitizenship. That information is needed. Then we
22 need the voter file information to put that into
23 context: How many of those individuals were actually
24 removed? How many of those individuals were not
25 removed or perhaps were removed and have since

1 reregistered because they are, in fact, citizens and
2 their removal was improper?

3 THE COURT: I understand.

4 MS. LEEPER: So we need the list of
5 individuals, and then we need the voter file snapshots
6 to provide the context.

7 THE COURT: So your point, as I'm
8 understanding it, is the name and address information
9 does not give you the information that you believe is
10 necessary to make the argument on Thursday that folks
11 have been removed improperly and not restored?

12 MS. LEEPER: Exactly, which goes to the very
13 nature of sort of the systematic nature of this voter
14 purge, as we're alleging, and also the irreparable
15 harm.

16 THE COURT: All right. Anything further to
17 add?

18 MS. LEEPER: No, Your Honor. Thank you very
19 much.

20 THE COURT: Thank you both very much. Thank
21 you both very much for your arguments today. Give me
22 one minute, if you would.

23 All right. Thank you, Counsel.

24 This action is before the Court on
25 plaintiffs' emergency motion for expedited discovery,

1 which has been briefed and argued on an expedited
2 schedule. All parties have had an opportunity to be
3 heard both in writing and orally. Based on the urgent
4 nature of this case and the Court's broad discretion to
5 manage discovery and its docket, the Court makes the
6 following findings and rulings:

7 Plaintiffs' amended complaint alleges four
8 violations of the National Voter Registration Act, and
9 the hearing on plaintiffs' preliminary injunction has
10 been scheduled for this Thursday, October 24, 2024.

11 In support of their arguments for preliminary
12 injunction, plaintiffs have filed a motion with this
13 Court seeking expedited discovery, including documents
14 and two depositions. This request comes before the
15 parties have held a Rule 26(f) conference or the Court
16 has otherwise authorized discovery.

17 The defendants' primary objection, as well as
18 other objections they've highlighted today, to
19 providing expedited discovery is their assertion that
20 plaintiffs waited too long to bring this action to
21 request this discovery and that it would be burdensome.

22 The record reflects the plaintiffs tried
23 without success to engage defendants to voluntarily
24 provide this information for months, but the defendants
25 refused to provide any of it until after the election.

1 Specifically, on August 7, the governor
2 issued Executive Order 35.

3 On August 13 and August 20, plaintiffs asked
4 defendants for information relating to the
5 Commonwealth's program to remove people from the voting
6 rolls.

7 On September 9, the parties met to discuss
8 plaintiffs' request for information.

9 On October 3, plaintiffs sent defendants a
10 violation letter.

11 On October 7, the defendants informed
12 plaintiffs that they would not produce any information
13 until after the election.

14 That same day, October 7, plaintiffs filed
15 their action in this court.

16 The next day, October 8, plaintiffs filed a
17 motion with this Court requesting expedited discovery.

18 On October 14, the parties met and conferred
19 again about the motion and plaintiffs' request for
20 information. But to date, none of the requested
21 information has been provided.

22 The Court has considered the totality of the
23 circumstances, as well as the factors identified in *Kia*
24 *Motors v. Greenbrier* and *Lapp v. United States* and
25 finds that plaintiffs' request for expedited discovery

1 is reasonable and supported by good cause. In
2 particular, the case is scheduled for a preliminary
3 injunction later this week.

4 The discovery plaintiffs seek is narrowly
5 tailored to obtain information probative to the
6 preliminary injunction analysis, and plaintiffs who are
7 advancing the interest of Virginia voters will be
8 irreparably harmed by waiting until the parties have
9 conducted a Rule 26(f) conference.

10 Alternatively, while this Court has no
11 jurisdiction to resolve whether plaintiffs should be
12 awarded a preliminary injunction and makes no findings
13 here, a review of plaintiffs' amended complaint
14 satisfies the Court that plaintiffs have alleged a
15 sufficiently colorable claim to justify limited
16 expedited discovery.

17 In enacting the National Voter Registration
18 Act, Congress explained that the right to vote is a
19 fundamental right and that governments must promote the
20 exercise of that right. And the Court finds that the
21 potential harm to any U.S. citizen who has been denied
22 the right to vote outweighs the burden on the
23 Commonwealth to produce information on an expedited
24 basis.

25 For these reasons, plaintiffs' motion for

1 expedited discovery is granted in part and denied in
2 part.

3 The defendants are ordered to provide on a
4 rolling basis beginning now and with a completion date
5 of Wednesday, October 23, 2024, at noon the following
6 information:

7 Individualized voter registration information
8 for the registered voters defendants have identified
9 and removed from the official list of eligible voters
10 on or after August 7, 2024.

11 Individualized voter registration information
12 for voter registration applicants denied registration
13 based on alleged noncitizenship on or after August 7,
14 2024.

15 The Virginia voter file snapshot for
16 August 7, 2024, and the Virginia voter file snapshot
17 for today, October 21, 2024.

18 Plaintiffs' request for the list of the 6,303
19 registered voters referred to in Executive Order 35 as
20 having been removed from the official list of eligible
21 voters between January 2022 and July 2024 is denied
22 without prejudice to plaintiffs' right to pursue this
23 information after the Court has authorized nonexpedited
24 discovery, as is plaintiffs' right to seek other
25 information relating to the creation and implementation

1 of Executive Order 35 and the training and other
2 material related to it.

3 My ruling today requires the disclosure of
4 information only for the registered voters who have
5 been removed from the official list of eligible voters
6 on or after August 7, 2024.

7 Plaintiffs' request for two short 30(b)(6)
8 depositions during the window of expedited discovery is
9 denied for several reasons. Plaintiffs have not
10 identified topics for the requested depositions as
11 required by Rule 30(b)(6), and the Commonwealth would
12 be prejudiced by a general deposition without any sense
13 of the topics or an opportunity to object to them.
14 Given the short time between today's hearing and the
15 preliminary injunction on Thursday, sufficient time
16 does not exist for the Commonwealth to prepare their
17 witness properly. Even a short deposition in a narrow
18 window of time runs the risk of becoming chaotic, and I
19 don't think it would materially add to Thursday's
20 hearing in a way that could not be addressed through
21 the production of documents.

22 Defendants's state in their papers and they
23 argue today that Commissioner Beals testified and
24 answered questions about the program on September 4,
25 2024. So there is some information available from her

1 as well.

2 This Court's ruling is unrelated to Judge
3 Giles' hearing on Thursday but is meant only to provide
4 the parties with access to information that may help
5 decide the issues before the court.

6 I will enter a written order consistent with
7 this ruling this morning, but this oral ruling is
8 effective immediately.

9 Any questions?

10 MS. LEEPER: No, Your Honor.

11 MR. SANFORD: Just to make sure that I have
12 the list correct?

13 THE COURT: Yes, sir. And I have a written
14 order I'll put together so you will have it today.

15 MR. SANFORD: I just wanted to make sure we
16 had it exactly on point.

17 THE COURT: It will not be an expansive order
18 as to the reasons, but it will be as to the information
19 I'm ordering to be produced.

20 MR. SANFORD: You said that the 6,300, that
21 was -- that request is being denied, and it's just the
22 post August 7?

23 THE COURT: Yes, sir.

24 MR. SANFORD: And then just on the voter --
25 on the snapshot issue, I just want to make the Court

1 aware that for snapshots -- because that's a snapshot
2 of a live database -- the August 7 snapshot is -- you
3 know, you can get very close to what it looked like.
4 You would have to run it on August 7. But I don't
5 think there's something -- if a general registrar
6 changed some information, it could be slightly
7 different from if you ran the process on August 7
8 itself. That's my understanding of the technology.

9 THE COURT: Can you give me a "for example"?

10 MR. SANFORD: I think if a general registrar
11 were to, like, backdate something and change a date,
12 that could be what is altered in it, but I am not
13 particularly familiar with how the technology works,
14 Your Honor. I just wanted to flag that issue. I think
15 kind of producing it will still work. You have to run
16 a query to do it, but I understand that they should be
17 able to do that, Your Honor.

18 THE COURT: All right. Ms. Leeper, any
19 questions based on counsel's comment?

20 MS. LEEPER: Not based on that
21 representation. We'll keep our ability to ask
22 questions after the fact depending on what's produced.

23 THE COURT: All right.

24 MR. SANFORD: Your Honor, just on the
25 individual voter information, I just want to check.

1 What information does that include?

2 THE COURT: The plaintiffs identified that
3 information in their -- I believe it was in a footnote
4 in their brief. That's what I was referring to by the
5 voter information. I'm happy to articulate that. It
6 probably makes sense to do it on the record anyway.
7 That includes the full name; residential address;
8 mailing address, if different; date of birth; phone
9 number; voter ID number; any associated state-issued ID
10 number, such as a driver's license number; all
11 registration dates, including earliest and most recent
12 registration date; and race if available.

13 MR. SANFORD: So, Your Honor, I believe some
14 of that information is not available and would require
15 writing a new program to pull that all together into,
16 like, a file that could be produced. I think we could
17 produce kind of the more limited information on a
18 faster basis.

19 THE COURT: What can't you produce?

20 MR. SANFORD: I believe -- the all
21 registration dates, I think you would need to run
22 searches across the system because it doesn't -- the
23 system doesn't kind of care about prior registrations.
24 It cares about whether you are registered because it's
25 a voting system. And so to look up that information, I

1 think they need to do deep dive searches to figure out
2 how you were registered.

3 I'm also not sure -- I know that they have
4 voter IDs -- whether state-issued IDs are -- I think
5 race isn't maintained. State-issued IDs, I think, may
6 be available in some locations but not others. So kind
7 of -- there's a more complicated process to pull all of
8 that in. I think I need to talk to the technology
9 folks to figure out how long it would take to actually
10 do that type of process, Your Honor.

11 THE COURT: Ms. Leeper, is the registration
12 number really critical?

13 MS. LEEPER: I do not want to speak for our
14 expert and say it's not. This is what we have been
15 told is important, Your Honor.

16 THE COURT: Okay. I'm going to accept
17 Mr. Sanford's representation.

18 MS. LEEPER: Your Honor, if you would allow
19 me a little bit of something untypical --

20 THE COURT: Yes, ma'am.

21 MS. LEEPER: We have a different member of
22 our counsel team here who is much more familiar with
23 the data aspect. Would you mind if I confer with him
24 quickly?

25 THE COURT: Please do.

1 MS. LEEPER: Thank you.

2 (Counsel confer.)

3 MS. LEEPER: Yes, Your Honor.

4 THE COURT: Come to the podium, if you would,
5 only because I know we have a court reporter here
6 today, but we're technically a court of recording and
7 not of record. So I want to make sure we have a clean
8 audio record as well. If you don't mind, step to the
9 podium.

10 MS. LEEPER: Happy to do so, Your Honor.

11 Yes, we've confirmed that we do, in fact,
12 need the registration number.

13 THE COURT: Why?

14 MS. LEEPER: In order to make the comparison
15 and to identify and match the voters that have been
16 removed with the voter on the voter file, Your Honor.

17 THE COURT: All right. Mr. Sanford, you've
18 got to do the best you can. I take your representation
19 that race doesn't exist and some of this information
20 may be difficult to find. But I expect you and your
21 clients to do the best they can to comply with the
22 Court's order.

23 MR. SANFORD: Yes, Your Honor. As I said, we
24 will do everything we can to comply with the order.
25 Just given the tight timeline, I did want to flag that

1 we might have problems with it, but we will get
2 everything together that we can.

3 THE COURT: I appreciate it. I know this is
4 a burden to you and your client, but I think this is an
5 important issue that takes precedent over what the
6 workload may be.

7 Any other questions?

8 MR. SANFORD: No. Thank you, Your Honor.

9 THE COURT: Anything further from the
10 plaintiffs?

11 MS. LEEPER: No, Your Honor.

12 THE COURT: All right. The Court stands in
13 recess.

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Time: 12:08 p.m.

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22 I certify that the foregoing is a true and
23 accurate transcription of my stenographic notes.

24

25

/s/
Rhonda F. Montgomery, CCR, RPR